

No. 26169

**CHINA
and
AUSTRALIA**

**Agreement on the reciprocal encouragement and protection
of investments (with annexes). Signed at Beijing on 11 July
1988**

Authentic texts: Chinese and English.

Registered by China on 26 September 1988.

**CHINE
et
AUSTRALIE**

**Accord relatif à l'encouragement et à la protection réciproques
des investissements (avec annexes). Signé à Beijing
le 11 juillet 1988**

Textes authentiques : chinois et anglais.

Enregistré par la Chine le 26 septembre 1988.

AGREEMENT¹ BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF AUSTRALIA ON THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS

The Government of the People's Republic of China and the Government of Australia (hereinafter referred to as the Contracting Parties),

Recognising the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations and technical co-operation between them, particularly with respect to investment by nationals of one Contracting Party in the territory of the other Contracting Party;

Considering that investment relations should be promoted and economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence;

Acknowledging that investments of nationals of one Contracting Party in the territory of the other Contracting Party would be made within the framework of laws of that other Contracting Party; and

Recognising that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments and associated activities, combined with rules designed to render more effective the application of these principles within the territories of the Contracting Parties,

Have agreed as follows:

Article I. DEFINITIONS

1. For the purposes of this Agreement:

(a) "Company" means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised:

(i) Under the law of a Contracting Party; or

(ii) Under the law of a third country and is owned or controlled by an entity described in paragraph (1)(a)(i) of this Article or by a natural person who is a citizen or permanent resident of a Contracting Party under its law;

regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability.

(b) "Investment" means every kind of asset, owned, controlled or contributed by nationals of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time and includes:

(i) Tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) A company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) A claim to money or a claim to performance having economic value;

¹ Came into force on 11 July 1988 by signature, in accordance with article XIV (1).

- (iv) Intellectual and industrial property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill;
- (v) Any rights conferred by law or under a contract permitted by law, including rights to engage in agriculture, forestry, fisheries and animal husbandry, rights to search for, extract or exploit natural resources and rights to manufacture, use and sell products; and
- (vi) Returns which are reinvested.

Any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

(c) "Law" includes regulations.

(d) "National" of a Contracting Party means a natural person who is a citizen or a permanent resident of a Contracting Party under its law or a company.

(e) "Return" means an amount derived from or associated with an investment, including profits, dividends, interest, capital gains, royalty payments, management or technical assistance fees, payments in kind and all other lawful income.

(f) "Activities associated with investments", subject to the law of the Contracting Party which has admitted the investment, includes the organisation, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including industrial and intellectual property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase and sale of foreign exchange.

(g) "Territory" in relation to a Contracting Party includes the territorial sea, maritime zone or continental shelf where that Contracting Party exercises its sovereignty, sovereign rights or jurisdiction.

2. This Agreement shall not apply to a company organised under the law of a third country within the meaning of paragraph (1)(a)(ii) of this Article where the provisions of an investment protection agreement with that country have already been invoked in respect of the same matter.

3. This Agreement shall not apply to a person who is a permanent resident but not a citizen of a Contracting Party where:

- (a) The provisions of an investment protection agreement between the other Contracting Party and the country of which the person is a citizen have already been invoked in respect of the same matter; or
- (b) The person is a citizen of the other Contracting Party.

Article II. ENCOURAGEMENT AND ADMISSION OF INVESTMENTS

1. Each Contracting Party shall encourage and promote investments in its territory by nationals of the other Contracting Party and shall, in accordance with its law and investment policies applicable from time to time, admit investments.

2. Each Contracting Party reserves the right to refuse to admit the investments of any company of the other Contracting Party if nationals of any third country control such company, or if it has no substantial business activities in the territory of that other Contracting Party.

3. This Agreement shall not affect the right of a Contracting Party to allow or prohibit the making of investments within its territory by nationals of a third country.

4. This Agreement shall not prevent a national of one Contracting Party from taking advantage of the provisions of any law or policy of the other Contracting Party which are more favourable than the provisions of this Agreement.

5. A company duly organised under the law of a Contracting Party shall not be treated as a national of the other Contracting Party, but any investments in that company by nationals of that other Contracting Party shall be protected by this Agreement.

Article III. TREATMENT OF INVESTMENTS

A Contracting Party shall at all times:

- (a) Ensure fair and equitable treatment in its own territory to investments and activities associated with such investments;
- (b) Accord within its territory protection and security to investments and activities associated with investments and, without prejudice to its law, shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments; and
- (c) Treat investments and activities associated with investments in its own territory, including compensation under Article VIII and transfers under Article X, on a basis no less favourable than that accorded to investments and activities associated with investments of nationals of any third country, provided that a Contracting Party shall not be obliged to extend to investments and activities associated with investments any treatment, preference or privilege resulting from:
 - (i) Any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or
 - (ii) The provisions of a double taxation agreement with a third country.

Article IV. ENTRY AND SOJOURN OF PERSONNEL

1. A Contracting Party shall, subject to its law and policies applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are nationals of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities associated with investments.

2. Subject to paragraph 1 of this Article, nationals of one Contracting Party, who have made investments in the territory of the other Contracting Party, shall be permitted by that other Contracting Party to engage within its territory key technical and managerial personnel of their choice regardless of citizenship.

Article V. SETTLEMENT OF DISPUTES BETWEEN NATIONALS OF THE CONTRACTING PARTIES

A Contracting Party shall in accordance with its law:

- (a) Provide nationals of the other Contracting Party who have made investments within its territory and personnel employed by them for activities associated with investments full access to its competent judicial or administrative bodies in order to afford means of asserting claims and enforcing rights in respect of disputes with its own nationals;

- (b) Permit its nationals to select means of their choice to settle disputes relating to investments and activities associated with investments with the nationals of the other Contracting Party, including arbitration conducted in a third country; and
- (c) Provide for the recognition and enforcement of any resulting judgments or awards.

Article VI. TRANSPARENCY OF LAWS

Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect investments in its territory of nationals of the other Contracting Party:

- (a) Make such laws and policies public and readily accessible;
- (b) If requested, provide copies of specified laws and policies to the other Contracting Party; and
- (c) If requested, consult with the other Contracting Party with a view to explaining specified laws and policies.

Article VII. LIMITATIONS ON IMMUNITY

Any question arising in relation to an investment or activity associated with an investment of a national of either Contracting Party concerning immunity from the jurisdiction of the Courts in any proceeding, the procedure for service of initiating process or immunity from execution shall be resolved in accordance with the law of the Contracting Party which has admitted the investment.

Article VIII. EXPROPRIATION AND NATIONALISATION

1. A Contracting Party shall not take measures of expropriation or nationalisation or other measures having a similar effect relating to any investment unless the measures are in the public interest, non discriminatory, in accordance with the law of the Contracting Party which has admitted the investment and against reasonable compensation.

2. The compensation referred to in paragraph 1 of this Article shall be computed on the basis of the market value of the investment immediately before the measures became public knowledge. Where the market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. The compensation shall include interest at a reasonable rate from the date the measures were taken to the date of payment, shall be paid without undue delay, shall be freely convertible and shall be freely transferable between the territories of the Contracting Parties at the average of the daily exchange rates, determined on each of those days in accordance with the law of the Contracting Party which has admitted the investment, over the six months immediately prior to the taking of the measures.

Article IX. WAR OR ARMED CONFLICT

Nationals of a Contracting Party, whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, insurrection, revolt, or other similar events, shall be accorded treatment by the other Contracting Party no less favourable than that accorded to nationals of any third country, should it adopt any measures relating to such losses.

Article X. TRANSFERS

1. A Contracting Party shall, when requested, permit, subject to its law and policies, all funds of a national of the other Contracting Party related to an investment or activities associated with an investment in its territory, and earnings and other assets of personnel engaged from abroad in connection with an investment, to be transferred freely and without undue delay. Such funds include the following:

- (a) The initial capital plus any additional contributions used to maintain or expand the investment;
- (b) Returns;
- (c) Fees, including payments in connection with intellectual and industrial property rights;
- (d) Receipts from the whole or partial sale, divestment or liquidation of the investment;
- (e) Payments made pursuant to a loan agreement; and
- (f) Capital accretions.

2. The transfers abroad of such funds and the earnings of personnel shall be permitted in freely convertible currencies as classified by the International Monetary Fund and shall be made at the exchange rate determined in accordance with the law of the Contracting Party which has admitted the investment on the date of transfer.

3. Either Contracting Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

Article XI. UNDERTAKINGS GIVEN TO INVESTORS

A Contracting Party shall, subject to its law, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party with regard to an investment in accordance with its law and the provisions of this Agreement.

Article XII. SETTLEMENT OF DISPUTES BETWEEN ONE CONTRACTING PARTY AND A NATIONAL OF THE OTHER CONTRACTING PARTY RELATING TO INVESTMENTS

1. In the event of a dispute between a Contracting Party and a national of the other Contracting Party relating to an investment or an activity associated with an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

2. If the dispute has not been settled within three months from the date either party gave notice in writing to the other concerning the dispute, either party may take the following action:

- (a) In accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before its competent judicial or administrative bodies; and
- (b) Where the parties agree or where the dispute relates to the amount of compensation payable under Article VIII, submit the dispute to an Arbitral Tribunal constituted in accordance with Annex A of this Agreement.

3. The action referred to in paragraph 2 of this Article shall be without prejudice to the right of the parties to seek assistance with regard to the dispute from any competent government agency of the Contracting Party which has admitted the investment.

4. In the event that both the People's Republic of China and Australia become party to the 1965 Convention on the Settlement of Investment Disputes Between States and

Nationals of Other States,¹ a dispute may be submitted to the International Centre for the Settlement of Investment Disputes for resolution in accordance with the terms on which the Contracting Party which has admitted the investment is a party to the Convention.

5. In any proceedings involving a dispute relating to an investment or an activity associated with an investment, a Contracting Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the national concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss. Nevertheless, a national of a Contracting Party involved in such a dispute shall not be entitled to compensation for more than the value, as determined in accordance with paragraph 2 of Article VIII, of the investment which is the subject of the dispute, taking into account all sources of compensation within the territory of the Contracting Party liable to pay compensation.

Article XIII. SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1. The Contracting Parties shall consult when necessary on matters concerning the operation of this Agreement.

2. The Contracting Parties shall endeavour to resolve any dispute between them on the interpretation or application of this Agreement by prompt and friendly negotiations and consultations. If a dispute is not resolved by such means within sixty days of one Contracting Party seeking in writing such negotiations or consultations, it shall be submitted at the request of either Contracting Party to an Arbitral Tribunal established in accordance with the provisions of Annex B of this Agreement, or, by agreement, to any other international tribunal.

Article XIV. ENTRY INTO FORCE, DURATION AND TERMINATION

1. This Agreement shall enter into force on signature. It shall remain in force for a period of ten years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph 3 of this Article.

2. This Agreement shall apply to investments made after 21 December 1972.

3. At the end of the first period of ten years referred to in paragraph 1 of this Article and thereafter at any time either Contracting Party may terminate this Agreement by giving one year's written notice to the other Contracting Party.

4. Notwithstanding its termination in accordance with paragraph 3 of this Article, this Agreement shall continue to apply, for a further period of ten years from the date of its termination, to investments made or acquired prior to the date of its termination.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Beijing on the eleventh day of July, 1988 in the Chinese and English languages, both texts being equally authentic.

[Signed — Signé]²

For the Government
of the People's Republic
of China

[Signed — Signé]³

For the Government
of Australia

¹ United Nations, *Treaty Series*, vol. 575, p. 159.

² Signed by Zheng Tuobin — Signé par Zheng Tuobin.

³ Signed by Bill Hayden — Signé par Bill Hayden.

ANNEX A

1. The Arbitral Tribunal referred to in paragraph 2(b) of Article XII shall consist of 3 persons appointed as follows: each party to the dispute shall appoint one arbitrator; the arbitrators appointed by the parties to the dispute shall, within 30 days of the appointment of the last of their number, by agreement, select an arbitrator as Chairman who is a national of a third country which has diplomatic relations with both Contracting Parties.

2. If, within 60 days after a party has given notice in writing instituting the arbitration proceedings, agreement has not been reached on a Chairman of the Arbitral Tribunal, either party to the dispute may request the President of the International Bank for Reconstruction and Development to make the appointment.

3. If a party to the dispute, receiving notice in writing from the other party of the institution of arbitration proceedings and the appointment of an arbitrator, shall fail to appoint its arbitrator within 30 days of receiving notice from the other party, such arbitrator shall be appointed by the Chairman of the Arbitral Tribunal after the Chairman is appointed.

4. In case any arbitrator appointed as provided in this Annex shall resign, die or otherwise become unable to perform his functions as an arbitrator, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and his successor shall have all the powers and duties of the original arbitrator.

5. The Arbitral Tribunal shall, subject to the provisions of any agreement between the parties to the dispute, determine its procedure by reference to the rules of procedure contained in the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

6. The Arbitral Tribunal shall decide all questions relating to its competence.

7. Before the Arbitral Tribunal makes a decision it may at any stage of the proceedings propose to the parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, any agreement between the parties to the dispute and the relevant domestic law of the Contracting Party which has admitted the investment.

8. An award shall be final and binding and shall be enforced in the territory of each Contracting Party in accordance with its law.

9. Each party to the dispute shall bear the costs of its appointed arbitrator. The cost of the Chairman and other expenses associated with the conduct of the arbitration shall be borne equally by the parties.

ANNEX B

1. The Arbitral Tribunal referred to in Article XIII shall consist of three persons appointed as follows: each Contracting Party shall appoint one arbitrator, and a third arbitrator, who shall be a national of a country with which both Contracting Parties maintain diplomatic relations, shall be appointed by the agreement of the Contracting Parties. This third arbitrator shall also act as "Chairman of the Tribunal".

2. Arbitration proceedings shall be instituted upon notice being given through the diplomatic channel by the Contracting Party instituting such proceedings to the other Contracting Party. Such notice shall contain a statement setting forth in summary from the grounds of the claim, the nature of the relief sought, and the name of the arbitrator appointed by the Contracting Party instituting such proceedings. Within 60 days after the giving of such notice the respondent Contracting Party shall notify the Contracting Party instituting proceedings of the name of the arbitrator appointed by the respondent Contracting Party.

3. If, within 60 days after the giving of notice instituting the arbitration proceedings the Contracting Parties shall not be agreed upon a Chairman of the Tribunal, either Contracting Party may request the President of the International Court of Justice to make the appointment. If the President is a national of either Contracting Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a national of either Contracting Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the appointment.

4. In case any arbitrator appointed as provided in this Annex shall resign, die or otherwise become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and his successor shall have all the powers and duties of the original arbitrator.

5. The Arbitral Tribunal shall convene at such time and place as shall be fixed by the Chairman of the Tribunal. Thereafter, the Arbitral Tribunal shall determine where and when it shall sit.

6. The Arbitral Tribunal shall decide all questions relating to its competence and shall, subject to any agreement between the Contracting Parties, determine its own procedure.

7. Before the Arbitral Tribunal makes a decision, it may at any stage of the proceedings propose to the Contracting Parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, the international agreements both Contracting Parties have concluded and the generally recognised principles of international law.

8. Each Contracting Party shall bear the costs of its appointed arbitrator. The cost of the Chairman and other expenses associated with the conduct of the arbitration shall be borne in equal parts by both Contracting Parties.

9. The Arbitral Tribunal shall afford to the Contracting Parties a fair hearing. It may render an award on the default of a Contracting Party. Any award shall be rendered in writing and shall state its legal basis. A signed counterpart of the award shall be transmitted to each Contracting Party.

10. An award shall be final and binding on the Contracting Parties.